

REMARKS/ARGUMENTS

Claims 1, 3, 5 through 7, 10 through 15, 20 through 24, and 26 through 30 are pending in the application. Applicants again appreciate the fact that the Action has indicated that claims 26 and 27 are allowed. However, for at least the reasons set forth below, Applicants respectfully submit that the remaining claims are also allowable.

The Office Action (Action) objects to the amendment filed on February 22, 2005 under 35 U.S.C. §132(a) contending that it introduces new matter into the disclosure. Specifically, the purported newly added material is as follows: "one or more malodor counteractant materials does not include ascorbic acid or its derivatives".

Similarly, the Action also rejects claims 1, 3, 5, 24 and 28 through 30 under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. The material cited by the Action as not being supported by the original disclosure is as follows: "one or more malodor counteractant materials does not include ascorbic acid or its derivatives".

Applicants respectfully submit that the claim limitation "one or more malodor counteractant materials does not include ascorbic acid or its derivatives" is not new matter and is supported in the original disclosure. As clearly noted under MPEP 2173.05(i), the current view of the courts is that there is nothing inherently ambiguous or uncertain about a negative limitation as long as the boundaries of the patent protection sought are set forth definitely, albeit negatively, and the claim complies with §112, second paragraph. Clearly, claims 1 and 28, which recite the claim limitation at issue, are definite and distinctly claim the subject matter regarded as the invention by Applicants.

Applicants also submit that the exclusionary proviso at issue has a basis in the original disclosure. As noted by the Action, the use of ascorbic acid as one alternative malodor counteractant material is disclosed among other alternative elements. As noted by the court, if alternative elements are positively recited in the specification, they may be explicitly excluded in the claims. *In re Johnson*, 558 F.2d 1008, 1019, 194

USPQ 187, 196 (CCPA 1977) ("[the] specification, having described the whole, necessarily described the part remaining.") Ascorbic acid is an alternative element positively recited in the specification; therefore, it may be explicitly excluded, as recited in the present claims.

In view of the above, it is clear that the exclusionary proviso, as presently claimed, complies with 35 USC §§132(a) and 112, as well as the current view of the courts. Therefore, reconsideration and withdrawal of the objection and rejection are respectfully requested.

Claims 6, 7, 10 through 15 and 20 through 23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,880,417 to Yabrov et al. (Yabrov).

Yabrov discloses an **anal pad** for preventing soiling of underwear due to undesired anal discharge and for muffling noise due to flatus. A novel feature of the anal pad is the inclusion of glycerin in an absorbing layer for neutralizing odor caused by hydrogen sulfide gas (col. 4, lines 41-44).

Claim 6 recites a tampon for absorbing body fluids. The tampon has glycerin present between about 0.01 grams to about 50% of the total weight of the tampon. The glycerin is naturally sourced.

Claim 11 recites a tampon for absorbing body fluids. The tampon has thereon a malodor counteractant material comprising: glycerin; and at least one additional malodor counteractant material selected from the group consisting of: aldehyde, natural oil, solution of soluble natural compound, natural plant and herb extract, naturally occurring deodorizing active, citric acid, base, EDTA, ester, masking agent, sensory receptor alterant, oxidizing agent, biological agent, surfactant, surface active polymer, zeolite, and any mixtures thereof.

Claim 20 recites a tampon for absorbing body fluids. The tampon has a fibrous material suitable for absorbing said body fluids and a liquid glycerin that does not support microbial growth disposed in the tampon to absorb odors associated with the body fluids.

Applicants respectfully submit that the Action again fails to make a prima facie case of obviousness. The following criteria must be met to establish a prima facie case of obviousness. First, the prior art relied upon, coupled with the knowledge generally available in the art at the time of the invention, must contain some suggestion or incentive that would have motivated the skilled artisan to modify a reference or combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference, or combination of references, must teach or suggest all of the claimed limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must be found in the prior art, and not based in on Appellant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

Yabrov does not contain any suggestion or incentive that would have motivated the skilled artisan to modify the anal pad to a tampon. The Action acknowledges that Yabrov does not specifically disclose a tampon (page 4). However, the Action maintains that it would have been obvious to one of ordinary skill in the art at the time the invention was made to use the invention of Yabrov in an article for absorbing menstrual fluid, such as a tampon. The Action supports this contention by asserting that the anal pad of Yabrov neutralizes hydrogen sulfide gas and it is old and well known that hydrogen sulfide gas is one of the gasses associated with menstrual fluid, thus it would be obvious to modify Yabrov to arrive at the claimed invention. The Action cites U.S. Patent Application No. 2003/0093043 to Yi et al. (Yi) merely as an example of hydrogen sulfide gas as one of the gases associated with menstrual fluids. Applicants respectfully disagree with these assertions.

It is respectfully submitted that the Action, along with Yabrov, fails to appreciate that gases associated with menstrual fluid are far more complex than just hydrogen

sulfide gas. The Action apparently ignored the description in Yi that indicates that menses generates several other gases, such as ammonia, trimethylamine, mercaptane and amine, in addition to hydrogen sulfide (paragraph 50). Therefore, the present invention cannot be rendered obvious by Yabrov, as Yabrov not only fails to disclose or suggest a tampon, it also only contemplates neutralizing hydrogen sulfide gas emitted from the anus. Yabrov clearly fails to disclose, suggest, contemplate, or remotely appreciate vaginal malodor, the complexity of the gases associated with vaginal malodor and the claimed tampon, which effectively treats vaginal malodor.

Furthermore, it is respectfully submitted that nowhere in Yabrov is a tampon with one or more malodor counteractant materials in the claimed amounts, as recited in claims 6, 11 and 20, disclosed or suggested. The claimed tampon, having one or more malodor counteractants, neutralizes, suppresses and/or eliminates odors associated with body fluids emanating from a vagina, not just hydrogen sulfide gas, contrary to Yabrov.

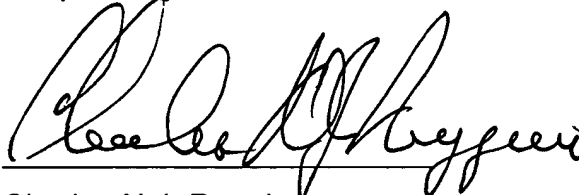
Finally, the Action supports Applicant's contention in that the Action acknowledges that Yabrov does not specifically disclose a tampon and Yabrov is silent on the claimed amount of counteractant material present in the tampon (page 4). Contrary to the Action's contention that the claimed amounts are an obvious matter of design choice, Applicants respectfully maintain that the use of the counteractant material in the claimed amounts is not arbitrary. As clearly noted in Figs. 2 and 3, in conjunction with the present specification at pages 18-19, use of malodor counteractant in the claimed amount produces a tampon with exceptional malodor counteractant ability.

Therefore, at least for the reasons set forth above, it is respectfully submitted that the Action fails to make a prima facie case of obviousness. Applicants respectfully submit that claims 6, 7, 10 through 15 and 20 through 23 are patentably distinguishable over Yabrov. Therefore, Applicants respectfully request reconsideration and withdrawal of the §103(a) rejection.

Applicants maintain that claims 1, 3, 5 through 7, 10 through 15, 20 through 24, and 26 through 30 are patentably distinguishable over the cited art. As such reconsideration and withdrawal of the above rejections and passage of this application to allowance is respectfully requested.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles N.J. Ruggiero", written over a horizontal line.

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